4-1700-3082-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by
Stephen W. Cooper. Commissioner,
Department of Human Rights,
Complainant,

ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

v .

Layle French
Respondent.

A motion for Partial Summary Judgment was submitted on February 6, 1989 by Andrea Mitau Kircher, Special Assistant Attorney Ceneral, 1100 Bremer Tower. Seventh Place and Minnesota Street, St. Paul, Minnesota 55101 for the Department of Human Rights. James R. Anderson, Attorney at Law, P.O. Box 1196, Marshall, Minnesota 56258, submitted a response to that Motion on behalf of the Respondent. The final submission was received on March 2. 1989.

Based upon all of the records, files and proceedings herein, the Administrative Law Judge makes the following:

ORDER

For the reasons set forth in the memorandum appended to this Order, Complainant's Motion for Partial Summary Judgment on the issue of liability is GRANTED. The Judge will schedule a hearing to take evidence on the issue of damages.

Dated this -15th day of March, 1989.

ER C. ERICKSON
Administrative Law Judge

MEMORANDUM

Complainant seeks summary judgment on the issue of liability arguing that, as a matter of law, Respondent has discriminated against the charging party on the basis of marital status. Respondent does not contest the factual basis of the motion, but rather asserts several legal defenses to a determination of liability. Summary judgment is

appropriate when no genuine issues of material fact are presented. Nord v. Herried, 305 N.W.2d 337, 339 (Minn. 1981). The evidence must be considered in the most favorable light to the non-moving party. Sauter v. Saute;, 70 N.W.2d 351 (Minn. 1955). Under Minn. Rule of Civil Procedure 56.05, the party defending the motion for summary judgment must present "specific facts showing there is a genuine issue for trial." Reciting conclusions without factual support does not meet this burden. Grandnorthern, Inc. v. West Mall Partnership, 359 N.W.2d 41, 44 (Minn.App. 1984); State v. Hennepin County. HR-87-026-PE (Decision issued September 11, 1987), aff'd, 425 N.W.2d 278 (Minn.App. 1988).

The relief requested in Complainant's Motion is for a determination that Respondent has violated the Human Rights Act because of his refusal to rent an apartment to the charging party, solely on the basis of her marital status. Complainant argues that this conduct specifically violates Minn. Stat. sec 363.03, Subd. 2(l)(a). Respondent has admitted that he refused to rent on the basis of the applicant's not being married and her intent to cohabit with a person of the opposite gender.

To prove a violation of the Human Rights Act with respect to discriminatory rental practices, three elements must be shown. First, the Respondent must own the rental property. Second, an applicant must seek to rent the property. Third, the Respondent must refuse to rent the property in a discriminatory manner. Minn. Stat. 363.03 Subd. 2. Respondent has only disputed the third element.

Respondent argues the following defenses to the charge of discrimination:

1. Compliance with the Act would render Respondent an accessory to the criminal offense of fornication as set forth in Minn. Stat. S 609.35;
2. Respondent's religious liberty is impaired by forcing him to violate his religious beliefs;
3. Refusal to rent to cohabitants is not discrimination on the basis of marital status;
4. The Act is discriminatorily enforced by the Department;
5. The Act is invalid for failure to provide a jury trial in accordance with the Minnesota Constitution; and,
6. The Act violates the requirements of due process by infringing property rights without a legitimate purpose.

Respondent's concern that he may be charged as an accessory to a crime for renting to an unmarried couple is misplaced. The leasing of premises to any individual does not establish privity with a criminal enterprise, absent specific statutory language People of County of Kane v. Midway Landfill, Inc., 321 N.E.2d 91, 94 (Ill.Ct.App. 1974); 49 Am.Jur.2D Landlord and Tenant sec. 10. The landlord must aid or abet the tenant in the illegal use, beyond the mere renting of the property. People v. Midway Landfill, Inc.. at 94. Further, the offense of fornication has fallen into disuse.1 As early as 1974, commentators called for the repeal of the statute. Sedgwick, Minnesota's Antiquated Sex Laws., 42 Hennepin Lawyer 20 (Jan/Feb 1974).2 The Minnesota Supreme Court ha! had the opportunity, in an analogous case, to rule that the possibility of committing a criminal offense removes an employer's duty to comply with the Act. State ex rel. McClure v. Sports and Health_Club, Inc., 370 N.W.2d 844 (Minn. 1985). Although the dissent in that case

explicitly refers to the fornication statute (Sports and Health, at 872).
the majority upheld the applicability of the Act. The Court of Appeals. in a related case, did not address the issue, despite the statute having been cited in an exhibit reproduced in the Court's opinion. State by Johnson v. Sports and Health Club, Inc., 392 N.W.2d 329 (Minn.App. 1986). Fear of prosecution as an accessory to the misdemeanor offense of
fornication is not a defense to a charge of discrimination based on the facts herein.

Similarly, there is no defense to a charge of discrimination by claiming that the conduct required under the Act violates sincerely held religious beliefs. Entry into for-profit undertakings passes over the line which affords an individual absolute protection for First Amendment beliefs. Sports and Health, at 853 (Minn. 1985). The elimination of pernicious discrimination to benefit the citizens of the state as a whole
is an overriding governmental interest. Id, at 853. This overriding interest overcomes the First Amendment protection claimed by the Respondent in exercising his sincerely held religious beliefs. Id, at 853. Sincerely held religious beliefs were not a valid defense where an
employer who provided living quarters discriminated against an employee cohabiting with another person. State by Johnson v. Porter Farms, Inc.,
382 N.W.2d 543 (Minn.App. 1986).3 Sincerely held religious beliefs do not insulate an individual engaged in for-profit activities, such as renting, from the requirements of the Human Rights Act.

The term "marital status" may be interpreted broadly or narrowly when
construing the statute. Respondent has cited cases which have narrowly interpreted this term. Prince George's County v. Greenbelt Homes, Inc.,
431 A.2d 745 (Md.App. 1981);4 McFadden v. Elma Country Club, 613 P.2d 146 (Wash.App.Div.2, 1980).5 Minnesota, along with other jurisdictions,6
has explicitly chosen to construe "marital status" broadly. Kraft, Inc. v. State, 284 N.W.2d 386, 388 (Minn. 1979). This interpretation has been
reflected in subsequent cases brought under the Act. Sports and Health, supra; Porter Farms, supra; State by Cooper v. Kozlowski, OAH No. 59-1700-2825-2 (Order issued January 3, 1989).

The Human Rights Act was amended in 1988 by adding a definition of "marital status." Respondent claims that the amendment of the Act was in
response to the body of cases cited above. Respondent's Reply Brief, at 5. "'Marital status' means whether a person is single, married, remarried, divorced, separated, or a surviving spouse Minn. Stat. 363.01 Subd. 40 (1988)(emphasis added). Had the status of single been omitted by the legislature, Respondent's argument would have merit. The plain language of the statute, however, reinforces the broad reading of "marital status" as enunciated by the Minnesota Supreme Court in Kraft, supra.

A broad construction of "marital status" results in the threshold question: Did Respondent discriminate owing to the presence or absence of marital status? Loveland v. Leslie, 583 P.2d 664, 666 (Wash.App. 1978). Respondent stated that he had "no objection to renting this property to married people or single people...." Affidavit of Layle French, at 1. Respondent refused to rent to the applicant because "they would most likely engage in sex outside of marriage in this home." Id.,

at 1. Respondent has not expressed any unwillingness to rent to married persons on the ground that they will engage in sexual intercourse. Respondent has expressed no reason for refusing to rent to the applicant, other than the fact that the applicant was single and planned to cohabit with another person of the opposite sex. These undisputed facts show that Respondent discriminated on the basis of marital status in violation of the Human Rights Act.

Respondent argues the defense of discriminatory enforcement of the Human Rights Act in several respects. First, Respondent contends that the Department has discriminatorily enforced the Act by not prosecuting conduct harming persons discriminated against because of their religious beliefs. Affidavit of Layle French, at 3. Second, Respondent asserts that the Human Rights Department is hostile to religion. Memorandum in Opposition, at 4. Third, Respondent's attorney has filed a complaint with the Department alleging that the University of Minnesota discriminates on the basis of marital status by not permitting unmarried students of the opposite gender to reside together in University-controlled housing. Respondent claims that the Department's failure to prosecute this complaint proves discriminatory enforcement.

The argument that the Department does not prosecute complaints against persons discriminated against for their religious beliefs is not credible. The Sports and Health cases cited above are adequate examples of the Department's defense of individuals discriminated against on the basis of the person's religious beliefs. Similarly. arguing that the Department is hostile to religion is not germane. The Department is limited, by statute, to prosecuting discriminatory conduct on behalf of persons. Minn. Stat. 363.03. The Department is not empowered to assist or foster religions. The right of individuals to be free from discrimination along with the right of individuals to hold religious beliefs has been discussed in the cases cited above. The action or alleged inaction of the Department to redress discrimination does not constitute discriminatory enforcement absent a showing of an "intentional or deliberate decision" not to enforce laws against a "class of violators expressly included within the terms of such penal regulation...." State v. Vadnais, 202 N.W.2d 657, 659 (Minn. 1972).

Respondent's attorney has filed a complaint with the Department alleging that the University of Minnesota discriminates on the basis of marital status in housing. Affidavit of James R. Anderson. This complaint is an attempt to meet the "specific fact" requirement on the issue of discriminatory enforcement to defeat the Department's motion for summary judgment. Respondent overlooks essential differences between himself and the University, however. The University is not a landlord ' 7 To obtain housing from the University, one must be an enrolled student. University of Minnesota Housing Services, Living in 12 (1989). The University has particular interests in maintaining separate facilities for college men and women, such as maintaining order, discipline and an environment conducive to educational development. Futrell v. Ahren , 540 P.2d 214 (N.M. 1975)(citing Lynch v. Savignano, Civil No. 70-375-F (D.Mass. Oct. 6, 1970)). The difference between the University of Minnesota and Respondent is sufficient that the Department's failure to prosecute the complaint filed by Respondent's attorney does not constitute a basis for the defense of discriminatory enforcement.

The Department has discretion in proceeding on complaints, therefore failing to prosecute any single complaint does not constitute a "specific facts" necessary to thwart summary judgment. See United States v. Swanson, 509 F.2d 1205, 1208 (8th Cir. 1975); City of Minneapolis v. Buschette, 240 N.W.2d 500 (1976); State v. Vadnais, 202 N.W.2d 657 (1972). The Judge is not persuaded that alleged discriminatory enforcement is an issue which requires an evidentiary hearing.

Respondent has requested a jury trial and suggested that the Act is unconstitutional for prohibiting that right, as guaranteed under the Minnesota Constitution, Article One, Section Four. Memorandum in Opposition, at 4. The right to trial by jury controls only common law actions and statutory actions providing for jury trials. Breimhorst v. Beckman, 35 N.W.2d 719, 734 (Minn. 1949). When the Legislature creates a new remedy for injuries, not found in the common law, the Legislature may withhold the right of trial by jury. id.. at 734. The cause of action under the Act is unknown at common law. The Legislature has decreed that actions under the Act will proceed without a jury, whether in administrative proceedings or District Court. Failure to afford a jury trial does not invalidate this action.

A legitimate government purpose is required to effect a taking of property. Laue v. Production Credit Assn., 390 N.W.2d 823, 830 (Minn.App. 1986). As mentioned above, the State has a legitimate purpose which overrides even First Amendment rights, when one conducts for-profit business enterprises. The need to overcome "pernicious discrimination" is the legitimate government purpose behind the Act. Sports and Health, at 853 (Minn. 1985). The Act does not effect an unconstitutional taking prohibited by the Due Process provisions of the Minnesota Constitution.

The defenses presented by Respondent are, as a matter of law, invalid. Respondent has not shown that any material facts are in dispute. Partial Summary Judgment on the issue of liability in favor of Complainant is appropriate and is, therefore, granted.

P.C.E.

Not including Human Rights Act cases, Minn. Stat. sec. 609.34 has been cited only twice in recent years. In State v. Ford, 397 N.W.2d 876 (Minn. 1986), a school principal was charged with the offense for engaging in consentual sexual conduct with a sixteen year old student (prior to the amending of the criminal sexual conduct statute to include victims from sixteen to eighteen when the actor is in a position of authority over the victim). The Court set aside from consideration "for the moment" the charge of fornication and never returned to it. In State v. Rothering, 397 N.W.2d 346 (Minn.App. 1986), a defendant tried, unsuccessfully, to have fornication considered a lesser included offense to criminal sexual conduct. The last reported conviction for fornication in Minnesota occurred in 1914. State v. Gieseke, 125 Minn. 497, 147 N.W. 663 (1914).

21 The article examines the likelihood that, should adultery or fornication be prosecuted, the charge would fail on equal protection grounds. Fornication, intercourse between a man and an unmarried woman, is labelled a misdemeanor. Minn. Stat. sec. 609.34. Adultery, intercourse
between a man and a marrie woman, is labelled a gross misdemeanor. These statutes discriminate on the basis of gender and the marital status of the woman. In the interest of reform, Judge Sedgwick states:

> There is always the interesting rationale that since Adultery is never prosecuted anyway, it won't hurt to reduce the penalty from a gross misdemeanor to a misdemeanor.

42 Hennepin Lawyer 20.

The Respondent in this case argued he was a landlord, not an employer. This appears not to have been for the purpose of avoiding liability, but to reduce the amount of damages recoverable by Complainant.

This case was followed by Maryland Commission on Human Relations v. Greenbelt Homes, Inc., 475 A.2d 1192 (Md.App. 1984)(Davidson, J., dissenting). A portion of Judge Davidson's concise dissent reads as follows:

> In sum, Kuhr was prohibited by the applicable contractual covenant from residing in a Greenbelt housing unit with Searight because she was "not married" or, in other words, "single." In my view, she was "discriminated against with regard to housing because of her marital status." [citations omitted].

Greenbelt Homes, Inc., at 1198, 1199 (Minn.App. 1984). The Maryland Code does not provide a definition of "marital status," unlike the Minnesota statute, which includes "single" as a status. Maryland Code (1957, 1979 Repl.Vol.), Art. 49B, 20.

5/ This case was preceded by an appellate court case from Division One holding exactly opposite to McFadden. Loveland v. Leslie, 583 P.2d 664 (Wash.App.Div.1, 1978). The Washington Supreme Court has cited Loveland with approval. Yamauchi v. Department of Employment Security, 638 P.2d 1253, 1254 (Wash. 1982)(holding "marital status" to encompass being single).

Among jurisdictions holding the broad view of "marital status" are: California [Hess v. Fair Employment & Housing Commission, 187 Cal.Rptr. 712 (Cal.App.Div.2, 1982)]; New York (Munroe v. 344 East 76th Realty Corp., 448 N.Y.S.2d 388 (Sup.Ct.Sp.Term 1982), Yorkshire House Associates v. Lulkin, 450 N.Y.S.2d 962 (N.Y.Civ.Ct. 1982), Pleasant East Associates v. Cabrera, 480 N.Y.S.2d 693 (N.Y.Civ.Ct. 1984)]; New Jersey [Zahorian v. Russell Fitt Real Estate Agency 301 A.2d 754 (N.J. 1973)]; and Washington [Yamauchi, supra, (Wash. 1984)].

Whether a state university falls under a state landlord-tenant law was discussed but not decided in American Future Systems v. Pennsylvania State University, 688 F2d 907, 916 (3rd Cir. 1982). The University of Minnesota is statutorily exempted from complying with the laws concerning hotels. Minn. Stat. 157.14 (1986).